

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v

KDF Inc dba Subaru of Keene

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid vacation pay
RSA 275:44 IV liquidated damages

Employer: KDF Inc dba Subaru of Keene, 591 Monadnock Hwy, E Swanzey, NH 03446

Date of Hearing: August 25, 2015

Case No.: 50430

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally asserted he was owed \$3,000.00 in unpaid guaranteed wages for training pay for the first sixty days of employment. He then amended his claim to include \$761.00 for unpaid vacation pay and further sought liquidated damages on the entire claim. He notified the Department he had an alternate theory that he was either due the guaranteed training pay or commissions for June 2014 in the amount of \$2,376.85, however, he emphatically stated this notice was not an amendment to the claim.

The employer denies the claimant was not paid for all time worked. They argue the claimant received \$3,150.00, in excess of the \$3,000.00 guarantee. Further, the claimant was not eligible for vacation pay as he did not complete one year of full time continuous employment, as stated in their written policy.

As no wages are due, liquidated damages are not appropriate.

FINDINGS OF FACT

The parties disagree as to the claimant's date of hire. The claimant asserts his date of hire was May 5, 2014, as that is the date his personal data had been input into the employers system and he voluntarily took home training materials for review. The employer contends the claimant's date of hire is May 12, 2014, when he officially began work and started in their training program.

The date of hire listed on the pay stub, as the first date for payment of wages, is May 12, 2014. The employer did enter the claimant into a database for Subaru on May 5, 2014, so that he would have access to training materials. The employer credibly testified that the claimant was not required to review any materials prior to his actual start date of May 12, 2014. The claimant credibly testified he reviewed materials at home. The claimant made no claim for wages for time worked between May 5, 2014 and May 11, 2014.

The Hearing Officer finds the claimant's date of hire to be May 12, 2014.

The claimant received weekly pay checks from the employer. The first two pay checks dated May 23 and May 30, 2014, were for \$320.00, gross, each, a pro-rated amount, as the claimant did not work full time for the first two weeks. He then received a weekly check for \$400.00, gross, between June 6 and July 3, 2014. He received one pay check for \$210.00, gross, on July 11, 2014.

The claimant argues the employer did not provide a notification of rate of pay in writing as required by RSA 275:49. He answered a Craigslist advertisement for an auto sales representative, previously submitted, stating a "\$3,000 training guarantee first 60 days, starts as soon as you are hired!". Because he did not receive the pay plan in writing, he asserts he did not waive his right to commissions for June 2014.

The employer did not provide any further notification in writing, though they did review the plan with the claimant during the interview and he understood the terms of the training period. The employer credibly testified they discussed the training period guaranteed salary at length with the claimant, which specifically did not include commissions, and the subsequent pay plan options of salary or draw against commissions once the training period had ended.

RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The claimant received \$2,850.00 in wages from the employer and a \$300.00 incentive pay from Subaru. The employer also provided \$250.00 to the claimant for a clothing allowance. In total, the claimant received \$3,100.00 in wages from the employer and \$300.00 from Subaru, in excess of the \$3,000.00 training pay for the first sixty days of employment.

The Hearing Officer finds that the employer was not in compliance with the requirements of Lab 803.03 (a) when they did not inform the claimant, in writing, of his rate of pay. The Hearing Officer also finds that this does not automatically guarantee the

claimant will prevail. The claimant was informed, verbally, and by notice of the advertisement, of the training pay of \$3,000.00. The claimant knew that he would receive a guarantee of \$3,000.00 during training and was ineligible for commissions during this period. The claimant, therefore, fails to prove by a preponderance of the evidence that he is due any further training pay or commissions.

The claimant further alleges he is due \$761.00 in unpaid vacation pay because he completed one year of employment from May 5, 2014 through May 7, 2015, when the employer terminated his employment.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding vacation pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer properly noticed the claimant of the written policy regarding the vacation policy and maintained on file an acknowledgement signed by the claimant.

The employer's written policy as it pertains to vacation pay, previously submitted, states in relevant part, "Only full-time employees are eligible for paid vacation time. Vacation benefits are earned based on your anniversary date of employment. After twelve months of continuous service, you will be eligible for five days of vacation time."

The claimant's first day of work was May 12, 2014. For the first two pay periods, he worked on a part-time basis for the employer because he had just given his notice at his previous job and was working for both entities. He began full time with the employer on May 26, 2014.

The claimant did not begin full time service with the employer until May 26, 2014. His employment terminated on May 7, 2015. As such, the claimant did not complete one year of service to be eligible for paid vacation pay under the written policy of the employer. Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed vacation pay under the written policy of the employer.

Because no wages are found to be owed, no liquidated damages can be awarded

DISCUSSION

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that his assertions are true.

Pursuant to Lab 202.05 "Proof by a preponderance of evidence" means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The claimant was pointedly evasive in answering direct questions regarding his claim. He did not present a clear and concise claim for the wages he alleged were due. His own testimony stated the claim was "a little sketchy."

The Hearing Officer finds the claimant failed to meet his burden in this claim.

DECISION

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed wages, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 V considers vacation pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is due any vacation pay, it is hereby ruled that this portion of the Wage Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: September 16, 2015

MJD/kdc